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Due Diligence for Private Acquisitions (Italy)

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A Practice Note considering the purpose, scope, and practical aspects of a legal due diligence investigation for the purchase of a private company or a business in Italy by way of share or asset purchase. This Note outlines the process for legal due diligence in Italy, including organising the investigation and various sources of information. It also considers issues of confidentiality and data protection during due diligence in Italy.

Due diligence is the investigation of a person or business. In the context of business acquisitions, the parties use the due diligence process to gather information about each other and about the target business that is for sale. Although the seller occasionally conducts due diligence on the buyer, the due diligence process is usually more significant for the buyer.

The primary purpose of a due diligence review is to obtain enough information about the target's business to enable the buyer (or other parties with an interest in the transaction, for example, lenders financing the transaction) to decide whether the proposed acquisition represents a sound commercial investment. Due diligence is effectively an audit of the target's affairs: legal, business, and financial. It is therefore a crucial bargaining tool for the buyer.

Completing a due diligence investigation of a business can be more challenging and complex for a buyer in cross-border transactions. Due diligence practices can vary significantly between countries because of different:

- Legal and regulatory practices.
- Financial reporting systems.
- Business practices, expectations, and customs.

If different jurisdictions are involved, it is important for the buyer to understand the local legal and financial systems, operations, and culture.

This Note considers, from the buyer's perspective, the purpose, scope, and practical aspects of a due diligence investigation for a private share or asset purchase in Italy. It outlines the process for legal due diligence, including:

- How to organise the due diligence process.
- The various sources of information in a typical due diligence investigation.
- How the information gathered should be reviewed and presented.

It also considers issues of confidentiality and data protection in Italy.

For more information on asset purchases and main advantages and disadvantages compared to a share purchase, see Practice Note, Acquisition Structures: Comparing Asset Purchases and Share Purchases in Italy. Any reference to shares of a public limited company (*società per azioni* (SPA)) in this Note includes reference to the quotas of a private limited company (*società a responsabilità limitata* (SRL)), unless differently stated.

Where due diligence in the UK and in Italy is comparable, references to UK practice notes are included.

This Note also considers the effects of COVID-19 and of Russia-Ukraine war on due diligence (see Impact of COVID-19 and Russia-Ukraine war on Due Diligence).

Purpose of Due Diligence

The term "due diligence" is not defined by law and originally derives from the United States' Securities Act of 1933 as a defence to liability in connection with securities offerings. Notwithstanding the wide and consolidated use of this term in common law countries, in Italy the legislator and courts have only recently and sporadically begun to use it.

Through due diligence, a prospective buyer wants to be sure that the seller and the target company have good title to the underlying assets being bought and know the full extent of any liabilities that will be transferred on acquiring the underlying business. From the legal adviser's point of view, due diligence is typically viewed as providing a guide to assess the legal risk associated with the target's business and evaluate the viability of the proposed transaction.

The main purpose of the due diligence review is to address the information asymmetry between the different parties involved in a transaction, providing the buyer with enough information about the target to enable it (or other parties having an interest in the transaction, for example, lenders financing the transaction) to decide whether the proposed acquisition represents a sound commercial investment and, if so, to establish the appropriate terms and price. Due diligence is effectively an audit of the target's affairs: legal, business and financial. It is therefore a crucial bargaining tool for the buyer. The information provided in the due diligence report (including the target's critical success factors, strengths and weaknesses) enables the buyer to be in a better position to assess the risks and rewards of the purchase and, where needed, renegotiate the terms of the purchase agreement.

Due diligence is also important to protect the directors of the buyer's company, who will inform their shareholders and assure them that the proposed acquisition is a good deal. Indeed, the term "due diligence" also refers to the duty of care of the prospective buyer towards itself. In particular, directors of the buyer's company have a duty of care towards their shareholders and, as a result, they should ensure that the proposed acquisition is appropriate.

In drafting the acquisition agreement, due diligence should continue as issues arise in the preparation of schedules and the target's representations and warranties. The buyer will inevitably seek contractual protection from the seller in the form of warranties and indemnities but, in practice, the protection offered may be limited by disclosures and other contractual provisions that set some thresholds to define what is "material" or will have a "material adverse effect". Damages for breach may be difficult to quantify and to secure. The buyer may have an action in misrepresentation for any false or misleading pre-contractual statements about the target's business, but such actions offer limited protection, especially if they are filed after closing because normally buyers cannot walk-away from the transaction anymore.

While due diligence is not a substitute for contractual protection, it is an aid for the buyer to work out what contractual protection it requires from the seller and what risks it is not prepared to take on (for general guidance, see Practice Note, Warranties and indemnities: acquisitions (UK)). For example, on a share purchase, the buyer indirectly takes on all the historical liabilities of the target and may even have responsibility for land no longer owned by the target. So ultimately, the results of the due diligence investigation might either cast doubt on whether the buyer can get what it wants from the acquisition or make it clear that it will be too risky at any price.

Establishing Key Information

Generally, due diligence is carried out before signing the acquisition agreement (pre-acquisition due diligence); sometimes, it is also carried out afterwards (post-acquisition due diligence).

With respect to the pre-acquisition due diligence, a due diligence investigation should establish the following key information about the target:

- Hidden or unexpected liabilities (for example, environmental, pension and litigation).
- Change of control or non-assignment provisions triggered by the transaction.
- Non-compete or restrictions on business.
- Regulatory approvals that may be required for the transaction (for example, antitrust and foreign direct investment clearances).
- Mandatory trade unions consultation procedures.

This information puts the buyer in a better position to:

- Make a final decision on whether to proceed with the acquisition and, if so, at what price.
- Bargain with the seller.
- Plan the integration of the target's business.
- Determine the corporate structure of the transaction.
- Determine whether any ancillary documents will be needed (for example, a transitional services agreement).
- Understand the acquisition perimeter in an asset purchase (for example, assets, liabilities, and contract network).

With respect to the post-acquisition due diligence, a due diligence investigation should be carried out to:

- Ensure that certain assumptions were correct.
- Adjust the price or terminate the acquisition agreement in relation to events that have occurred since signing.
- Trigger the indemnifications in relation to events that have occurred since closing.

In principle, the more information that is available, the greater the buyer's comfort in finalising the transaction. The lower the level of information, the more likely the buyer may be to renounce the investment or offer the seller a lower price due to the increased risk assumed.

Business Due Diligence

Special advisers may be required to contribute to what the buyer calls "business due diligence".

Business due diligence looks at issues such as the market in which the business operates, competitors, the business's strengths and weaknesses, production, sales and marketing, and research and development. Some of the results of this part of the due diligence review will be relevant to the legal due diligence.

The business due diligence aims to test the assumptions already made in the buyer's acquisition plan and to identify the management action required by the buyer to take effective control of, and reduce risk in, the business once the deal has closed.

In particular, the business due diligence may include a review of:

- All market studies, feasibility studies, and similar reports on the target prepared within the last years.
- Reports on the target and its industry prepared by investment bankers and management consultants.

Financial Due Diligence

As part of the due diligence process, the buyer may instruct accountants to prepare a report on the financial aspects of the target business.

This financial due diligence is not the equivalent of an audit, and accountants' reports will usually make this clear. Financial due diligence should focus on those areas of the target's financial affairs that are material to the buyer's decision. This is so that the buyer can assess the financial risks and opportunities of the deal and whether, given these risks and opportunities, the target business will fit well into the buyer's strategy. Financial due diligence may also help quantify:

- Potential synergies.
- The best acquisition and financing structure.
- The impact of the acquisition on the buyer's performance metrics. When the buyer's accounting policies are more conservative than those followed in the target business, it may be necessary to make appropriate adjustments to measure the true impact.

Part of the accountants' investigation will be to review the target's audited accounts. However, it is important for the buyer's accountants to make their own enquiries as to the state of the target business.

In some circumstances, a seller may instruct its accountants to prepare a report on the target which it will then make available to buyers. This helps the seller determine appropriate values for the business it wishes to sell and may limit the due diligence potential buyers wish to undertake. The auditors of the target company may refuse to release their working papers to the buyer's accountants without an express written indemnity from the buyer (and the target) in relation to any claims made as a result of such release. Such indemnities are often broadly drafted, and a buyer should be encouraged to seek advice before signing any document containing such an indemnity.

Tax Due Diligence

Tax due diligence is usually carried out by the buyer's accountants as well as by tax advisers or tax lawyers. This is a key due diligence exercise to ensure the target company is properly accounting for tax and that there are no potential tax liabilities which could be triggered by the sale.

In particular, the tax due diligence may include a review of:

- Copies of all returns related to income tax, VAT and employees' withholding tax returns.
- All correspondence with any national, state or local tax authorities concerning adjustments or questioning compliance.
- The list of returns and the years thereof that have been audited by national, state or local tax authorities.
- The list of the relevant taxes applicable to the target and its subsidiaries.
- Copies of documents concerning any tax litigation proceedings.
- Copies of all legal and accounting tax opinions received by the target.

Tax due diligence will need to be carried on intragroup transactions that, for example, could trigger a clawback of stamp duty or capital gains tax reliefs on the exit of the target.

Who Carries Out Due Diligence?

Due Diligence Team

It is essential that the due diligence team is made up of appropriate people under clear leadership and with good reporting structures. The team carrying out the due diligence must involve the buyer's own personnel as well as its legal and financial advisers and accountants. Only the buyer's own personnel will be able to make effective judgements as to the commercial importance and potential risk brought to light by the information uncovered.

Before starting the due diligence investigation, the due diligence team should understand what kind of due diligence exercise it should carry out and what it should focus on. It should also analyse the main publicly available information on the seller and the target to obtain an initial snapshot of the target's business (see Public Sources of Information).

The task of preparing the legal due diligence checklist, the legal due diligence questionnaire and carrying out the investigation is often delegated to junior lawyers. Generally, each junior lawyer is responsible for a specific section of the due diligence exercise (for example, corporate, litigation, contracts and environmental). Senior lawyers should review the outcomes of the due diligence carried out by junior lawyers, prepare the due diligence report for the buyer, and negotiate the acquisition agreement. Junior lawyers doing the due diligence investigation may have no direct contact with the client, so must be fully briefed as to the purpose of the acquisition, the depth of investigation required and the key areas of importance for the client. If this information is not given, the onus is on the junior lawyers to ask the relevant questions rather than proceed with an unfocused investigation. Therefore, interaction among the team members is crucial for "connecting the dots" of the various areas of the due diligence investigation and making the outcome coherent and harmonious. To be prepared and updated, each lawyer should also read all the emails exchanged during the due diligence process even though they are not the direct addressees of the correspondence: due diligence is not an individual activity; it is team work and the team members should help each other to avoid mistakes.

In the case of a competitive procedure among potential bidders, usually, the seller's advisers carry out a cursory due diligence of the target company and provide the potential bidders with a vendor due diligence report, which can be a starting point for drafting the representations and warranties. The vendor due diligence report provides the potential bidders with a picture of the target. The selected bidder, who is selected at the end of the process, will then have the possibility to perform an in-depth analysis on certain aspects.

Engagement Letters

There should be a clear demarcation of the responsibilities of advisers. Ideally, areas of responsibility should be set out in engagement letters with key advisers. The co-ordinating role will usually be held by the adviser who is closest to the commercial negotiations.

Although responsible only for legal due diligence, lawyers need to be aware of the purpose and scope of business and financial due diligence.

Where many professional advisers are involved, it is important to clarify what the reporting lines are and who is acting for, and reporting to, whom. For example, will non-domestic lawyers or trade mark agents report directly to the buyer or to the main lawyers advising on the transaction?

The key is therefore good communication at all stages. There is a tendency to see due diligence as a lawyers' exercise, but if it is to be of value, it must be taken seriously, carefully planned and properly carried out with the involvement of the buyer.

An engagement letter has various purposes and benefits. These include:

- **Scope of work and responsibilities.** It provides a clear record of the scope of work the adviser has agreed to undertake (and not to undertake) and clarifies how this will fit together with the responsibilities of other advisers. Agreeing the scope of work and responsibilities at the outset will also help the parties to agree on what constitutes additional work for which additional fees may be payable. From the adviser's point of view, an engagement letter can confirm the buyer's authority and capacity to undertake the work and identify individuals from whom the adviser will take instructions.
- **Fees.** It specifies the fees and any commissions for the work to be done, including how they are to be calculated and when they will be paid, as well as when updates on fees should be given. This assists the buyer in its planning.
- **Information flow.** The engagement letter can set out agreement on the flow of information both to and from the adviser and, where appropriate (for example, in the investment bank's engagement letter), regulate the making of public announcements about the transaction.
- **Indemnity.** An engagement letter is also the appropriate place to set out any indemnity in favour of the adviser for losses arising out of its appointment (other than as a result of the adviser's own negligence or willful default). In addition, the letter may deal with the question of the buyer's involvement in the conduct of any claims arising against the adviser in connection with its role.

Advisers' Liability

Certain issues concerning the adviser's negligence may arise when the activity is carried out carelessly and the adviser does not inform the buyer about significant potential liabilities of the target. In such circumstances, the adviser could have contractual liability under Article 2229 and following of the Civil Code (*Codice Civile*). However, the activity carried out by advisers is a professional activity which, in turn, is not viewed as an obligation on the adviser to achieve a result (*obbligazione di risultato*), but as an obligation of means (*obbligazione di mezzi*).

To determine if the adviser has liability under Italian law, the adviser's activity should be assessed taking into account the following:

- The professional duty of care under Article 1776(2) of the Civil Code.
- The type of activity carried out by the adviser. Under Article 2236 of the Civil Code if the adviser's activity entails solving technical issues of special difficulty, the latter should be responsible only in case of gross negligence (*colpa grave*) or wilful misconduct (*dolo*).

Scope of Due Diligence Review

The scope of a due diligence investigation will depend on the purpose of the acquisition. For example, when two companies are looking for a trade advantage or element of synergy through a merger, the investigation will focus on matters such as economies of scale, marketing advantages and competition issues.

The extent of the investigation is also likely to be governed by practical realities, such as available time, expense and the overriding need to get the transaction done. Even if the investigation is well-focused, there will need to be a limit on the information to be supplied. To use an extreme illustration, a request in a legal due diligence checklist might be to disclose all current contracts to which the target is a party. Such an investigation would turn up many small contracts entered into in the ordinary course of business, such as an office plant care contract. Contracts such as these, which are made in the normal course of business, will have little bearing on the price or risks of the transaction. One solution would be to ask for details of all contracts entered into outside the ordinary course of business and to put a monetary floor on the value of contracts entered into in the ordinary course of business which are to be disclosed. Another approach might be to ask to review contracts entered into with material suppliers or customers, usually defined by reference to the spend with or by them as a percentage of total turnover.

The extent of the investigation may necessarily be limited by the timetable of the acquisition or because, for whatever reason, the seller is sensitive about the exercise. A full due diligence investigation may not be appropriate where a quick sale is a priority. A long investigation might allow another buyer to outbid the initial buyer, and the delay and the inevitable intrusion and interruption to the normal running of the target business might be unacceptable to the seller.

Although contractual protection is no substitute for a thorough due diligence exercise, it may offer some comfort where, for example, time is short and due diligence is limited (see Practice Note, Warranties and Indemnities (Italy)). In these circumstances, the buyer should at least seek to investigate key issues and take other steps to protect itself. For example, to:

- Ensure that warranties and indemnities are sufficiently wide.
- Consider negotiating a retention of the purchase price to cover potential warranty claims.
- Propose a price adjustment.
- Provide for particular sorts of problems to be solved as pre-conditions to completion. For example, to obtain the consents to the change of control or waivers of no assignment clauses (in case of asset purchases) or other awkward provisions in major trading agreements.

The buyer's legal advisers should also be aware of cost. The extent of the due diligence exercise should be in keeping with the value and importance of the acquisition to the buyer and the potential risk. Legal advisers should make clear arrangements with their clients in respect of fee arrangements (see Engagement Letters).

Discuss Scope of Due Diligence with Client

It may be helpful for the legal advisers to meet with the buyer at an early stage to agree the parameters of the investigation. At this meeting, the advisers should find out how much their client already knows about the target company and ask the client to highlight any areas of concern or areas on which the client wishes a specific review. In addition, the advisers and client should set out together the main criteria to analyse the uncovered documents, such as to:

- Identify the relevant time period in the analysis of the documents (not necessarily the same for all types of documents to be reviewed. For example, review of the financial statements of the last three years and the extraordinary transactions of the last five years).
- Determine a monetary floor, which is fundamental to select the documents to be reviewed (for example, review of disputes worth more than EUR1 million).
- Identify other objective parameters to select the documents to be reviewed on the basis of the target's business (for example, geographical criteria for administrative concessions).

Scope of Due Diligence and Foreign Direct Investment Regime in Italy

Before investing in an Italian business the due diligence team should carefully consider whether the prospective investment is in a strategic asset or activity under the foreign direct investment regime in Italy.

Under Law Decree no 21/2012 (FDI Law), the Italian government has special powers in relation to certain investments and other transactions (including purchases of shares or business) carried out by particular categories of foreign investors provided those investments or transactions concern certain strategic assets or activities falling in the sectors set out in the FDI Law.

If the target company falls within a strategic asset or activity under the FDI Law, government clearance as a condition precedent to closing should be inserted in the acquisition agreement.

For a thorough analysis of the foreign direct investment regime in Italy, see Practice Note, Regulation of Foreign Investment in Italy.

Due Diligence Checklist

One of the most important preliminary activities in the context of a due diligence exercise is to prepare the due diligence checklist, which is a list of the documents and information to be requested to the seller and to the target company that should be uploaded in the data room. To prepare the due diligence checklist, the buyer's advisers should read the main publicly available information on the target company (see Public Sources of Information). If the target is a company whose shares are traded on a stock exchange, the legal adviser should also review:

- Prospectuses of previous extraordinary transactions of the target company (if any).
- Corporate governance reports.
- Most recent infra-annual financial reports.
- *Commissione nazionale per le società e la borsa* (CONSOB) (the Italian regulator monitoring the financial markets) and *Borsa Italiana* (the Italian stock exchange) websites (to verify the composition of the shareholding and so on).
- Press releases of the target company and other publicly available press information.

Usually, a junior lawyer responsible for this task may start from a checklist form, which should be amended on the basis of the target's business and the characteristics of the transaction.

In drafting the due diligence checklist, the adviser should take into account the scope of the due diligence exercise that has been agreed with the client (see Scope of Due Diligence Review).

For general guidance, see Due diligence Checklist: Share Purchases (UK).

Due Diligence Questionnaire

The cornerstone of any due diligence exercise is the questionnaire or information request that sets out a list of questions and enquiries to be put to the seller.

These questions will usually be supplemented by further requests as the due diligence investigation and the negotiations proceed.

Ideally, the questionnaire should not be too technical; each section should be self-standing so that it can be considered by the appropriate adviser.

Care should always be taken to tailor standard due diligence questions so that they are relevant to the target company and the relevant transaction. Any information that the buyer already has may be helpful here.

The due diligence questionnaire should be well organised and easy to update. Each lawyer should draft the questions, review the related responses, update the due diligence report and inform the other members of the team in the event of relevant findings.

Periodically (for example, on a weekly basis), the buyer's advisers should send a new set of requests to the seller, which, in turn, should send its responses as soon as practicable even if the seller cannot collect them together at the same time.

If the seller does not answer some questions included in the questionnaire, the adviser should inform the buyer of this lack of information by written email to keep a track record and mention it in the legal due diligence report as an issue depending on the materiality of the missing information. Moreover, the adviser should try to arrange a specific conference call or meeting with a reference person of the seller to obtain such missing information.

For general guidance, see Standard Document, Legal Due Diligence Information Request: Long Form: Share Purchases (UK) and Standard Document, Legal Due Diligence Information Request: Asset Purchases (long form) (UK).

Data Rooms

Especially during the COVID-19 pandemic (see Impact of COVID-19 and Russia-Ukraine war on Due Diligence), the parties will prefer to set up a virtual (rather than a physical) data room in which the relevant information on the target will be made available. As the first approach to the data room, the legal team should map the documents in it and proceed to assign them to the team members, who will periodically check the new documents uploaded from time to time and verify if all the information requested through the due diligence checklist and the due diligence questionnaire has been provided. With the assistance of the senior lawyers, junior lawyers will identify the documents that require more in-depth analysis based on the target's business and prepare a detailed summary of them using specific forms (see Material Agreements).

The seller will prepare a data room regulation to be signed by the buyer, providing that the buyer undertakes to comply with the provisions in it also in the name and on behalf of its advisers under Article 1381 of the Civil Code. Sometimes, the data room regulation is also directly signed by the advisers who access the data room. To facilitate the access to the data room, an index of its content can be extracted. The seller and the buyer will agree on whether the buyer will be allowed to print and make a copy of the documentation contained in the data room.

For general guidance on due diligence data rooms, see Practice Note, Setting up a data room (UK).

Due Diligence and W&I Insurance

The due diligence process is also relevant in the context of buying a warranty and indemnity insurance (W&I Insurance), which covers unexpected losses arising out of the breach of representations and warranties (for more information on warranties and indemnities in an acquisition transaction, see Practice Note, Warranties and Indemnities (Italy)). Buyers and sellers are required to conduct their own due diligence (both financial and legal) rather than relying on the W&I Insurance. From the insurer's perspective, it is important to have a well-balanced and negotiated agreement and a robust and complete due diligence exercise: cursory or skipped due diligence investigation could lead to high premiums, low scope of coverage or denial of the W&I Insurance. To decide whether to provide the W&I Insurance, generally, insurers also arrange their own process with the assistance of an external legal counsel for reviewing:

- The due diligence process and reports, which are provided on a non-reliance basis.
- The disclosure made by the seller.
- The acquisition agreement and the disclosure letter.

Insurers' legal counsel prepare its own report, highlighting the key issues to be taken into account by the insurers for drafting and providing the W&I Insurance. Afterwards, typically, the insurer and the parties to the transaction, together with their advisers, arrange an underwriting call with the aim of clarifying the outstanding points, better assessing the risks in connection with the deal and giving comfort to the insurer on the transaction.

Eventually, the insurer and the insured party negotiate the wording of the W&I Insurance policy and execute it, specifying the date from which the risk will be transferred from the insured party to the insurer.

For more information on the W&I Insurance, see Practice Note, Warranty and Indemnity Insurance: Acquisitions (Italy).

Industry Risk

The buyer and its advisers will need to identify the main areas of risk and liability inherent in the industry in which the target operates. This will set the emphasis of the due diligence exercise and assist in seeking appropriate contractual protections from the seller. It should consider the following issues:

- What are the "normal" risks in this industry?
- What is the known reputation of the target company and how has it been run?
- What is the assessment of those who are selling it and, if different, who have been running it?
- Does the buyer have the personnel to run the business if the management it acquires are not up to the task?

If personnel are important, enquiries will need to focus on employment conditions and motivation. If the sector is heavily regulated, such as financial services or the pharmaceutical industry, questions about regulation need to be satisfactorily answered in advance. If the post-acquisition performance depends on a few critical contracts, it will be very important to ascertain the attitude of the other parties to the contracts to the acquisition before it takes place.

Large potential contractual liabilities may be characteristic of the way the industry operates. Where the buyer is a significant player in the market already, this may be part of the risk that it expects to take on when buying the business. However, this may affect what the buyer is prepared to pay, and the buyer may still decide to seek warranty protection as to the upper monetary limit on contractual obligations.

Depending on the nature of the target's business, the buyer may also want to instruct experts such as environmental experts, surveyors, IT or other relevant specialists.

IT Due Diligence

If the target company is heavily dependent on IT, or its business is the provision of IT services or products, then IT due diligence can be important to both buyer and seller (for general guidance, see Practice Note, Transferring IT systems (UK)). There are three factors that are key to due diligence in an IT context:

- **The relationship between target and seller, which may not cease on completion.** Following a sale, the target may well continue to provide IT services to the seller (or vice versa). This continuing relationship raises the importance of due diligence, as the buyer may be reluctant to look to warranties and indemnities because of a continuing service relationship between the target and the seller. Parties may have to enter into transitional service agreements where services are continued after the transaction closes. To the extent transitional service agreements involve the processing of personal data, parties must ensure that these agreements contain specific provisions dealing with data protection rules and data subject rights.
- **IT assets are generally intangible intellectual property rights.** Therefore, due diligence will be focused on these to ensure that the sale of the target will not affect licences or other rights, to establish what consents may be necessary and to determine ownership of copyright.
- **Skilled personnel are key assets for an IT company dependent on know-how.** Investigating this asset requires diplomacy and speed to prevent disgruntled personnel voting with their feet.

Environmental Due Diligence

The acquisition of a company that is a manufacturing or processing company, or whose assets include land used or previously used for industrial processes, will raise the need for environmental due diligence. The issues to investigate include the value of the target and its assets, title to land, potential responsibility for any clean-up and liability generally in relation to environmental damage. If such concerns are relevant, a buyer must decide on the level of investigation it wishes to undertake. This may range from a brief site visit and "desktop survey" (that is, a review of information including historical maps, geological or hydrological surveys and process information) to a more detailed survey involving detailed sampling of soil and ground water. The aim will be to determine and allocate responsibility for clean-up and to obtain protection where appropriate from the seller.

For more information on environmental due diligence in the context of a share or asset purchase transaction in Italy, see Practice Note, Environmental Issues in Corporate Transactions (Italy): Environmental Due Diligence.

Public Sources of Information

As well as the questionnaire and the data room, information about a target company can be derived from a variety of sources including the internet.

Corporate and Financial Information

Key corporate information can be obtained from:

- **Companies House.** For details of the information that may be obtained from the Companies House (*Registro delle Imprese*), see Company Searches.
- **Commercial providers.** Several commercial providers specialise in providing corporate information.
- **Listed companies.** Information about Italian companies with a listing on the Italian stock exchange, *Borsa Italiana*, can be obtained from the *Borsa Italiana* website.
- **Regulators.** Various Italian regulators such the *Commissione nazionale per le società e la borsa* (CONSOB) (the Italian regulator monitoring the financial markets) and the Bank of Italy (*Banca d'Italia*) publish information about companies under their supervision.

Real Estate

Public information that can be obtained from the real estate registries (*Registri Immobiliari*) includes:

- The identity of current and past owners.
- The acquisition date of the real estate.
- Details of any:
  - rights *in rem,* including rights over land such as the right of usufruct (*diritto di usufrutto*), right of surface (*diritto di superficie*) and right of emphyteusis (*enfiteusi*);
  - easements in specified cases;
  - mortgages (*ipoteche*);
  - long-term leases (lasting over nine years).

The complete list of transactions (and other deeds) involving real estate which must be made publicly available on the land registries is in Articles 2643 and 2645 of the Civil Code.

The real estate registries are held by the curator of real estate registries (*conservatoria dei registri immobiliari*).

On the purchase of real estate, the notary sends the deed of sale to the local real estate register and the deed of sale is then made publicly available.

For more information on legal due diligence on a real estate property in the context of a share or asset purchase transaction in Italy, see Practice Note, Property: Private Acquisitions (Italy): Due Diligence in Real Estate Transactions.

Intellectual Property

Patents

Patents searches can be conducted through:

- The official authorities' websites (see the websites of the Ufficio italiano brevetti e marchi, the European Patent Office (EPO) and World Intellectual Property Organization (WIPO)).
- The Espacenet database, for searches of Italian, European and international patents and patent applications.
- Patent agents and attorneys-at-law, who can conduct searches for applicants and owners.

Trade Marks

Trade mark searches can be conducted through:

- The official authorities' websites (see the websites of the Ufficio italiano brevetti e marchi, the European Union Intellectual Property Office (EUIPO) and the WIPO).
- The TM view database, for searches of national trade marks registered in EU member states, EU and international trade marks and trade mark applications.
- Trade mark agents and attorneys-at-law, who can conduct searches for clients.

Copyright

Since copyright is an unregistered intellectual property right there is no specific website or database that could be used to conduct searches. However, there are registers for specific categories of subject matter or work, such as the *Società Italiana degli Autori ed Editori* (SIAE).

Design Rights

Design searches can be conducted through the official authorities' websites (see the websites of the Ufficio italiano brevetti e marchi, EUIPO and WIPO).

Trademark agents and attorneys-at-law can conduct searches for applicants and owners.

News Services

News items can be obtained from news service providers such as the *Financial Times* or *Il Sole 24 Ore*.

Contact with Target Management

An important aspect of due diligence can be to establish contact with the target's management and to discuss the business with them. Unless the rationale for the acquisition is known to involve the wholesale removal of management from the target, existing managers have every incentive to co-operate with their new owners by disclosing, often with more candour than the sellers, the concerns about the business that keep them awake at night. Perhaps for this reason sellers, particularly on auction sales, try to restrict access to management.

The seller may include the target company as a party to confidentiality agreements between seller and buyer (tripartite agreements) to ensure the information of the target that will be disclosed in the data room during the due diligence process will be monitored. See Confidentiality Agreement and Disclosure Restrictions.

Knowledge of Seller

One technique used by sellers to limit the scope of their warranties in a share purchase agreement or in an asset purchase agreement is the insertion of qualifications in the purchase agreement such as "to the best of the seller's knowledge". If a warranty is limited by the seller's knowledge, the buyer bears a heightened burden of proof and can make a claim against the seller only if it can prove that:

- The warranty was inaccurate.
- The seller was aware of this fact at the time of signing of the purchase agreement (and/or at closing) and failed to inform the buyer accordingly.

It is important, when conducting due diligence, to determine whose knowledge is the seller's knowledge. The answer to this question is relatively straightforward if the seller is a natural person. However, if the seller is a legal entity, the question arises as to whether the knowledge is of the seller's managing director, individual directors, employees or auditors.

When establishing contact with the management, it is important to keep in mind whether the managers can be considered as managers who have knowledge from the seller's perspective and whose knowledge will trigger the seller's liability.

For more information on the limitations of seller's liability under warranties and indemnities in a share or asset purchase agreement, including the seller's knowledge qualifier, see Practice Note, Warranties and Indemnities (Italy): Limitation of Seller's Liability Under Warranties and Indemnities.

Confidentiality Agreement and Disclosure Restrictions

Confidentiality Agreement

Although a seller will typically require prospective buyers to enter into a confidentiality agreement, these are difficult to enforce in practice. Where the buyer is a competitor or potential competitor, a seller may be particularly reluctant to disclose sensitive information about the target business until it can be sure that the sale will go through. The knowledge that a business is for sale can also be unsettling for employees, customers and suppliers. At worst, it can lead to a permanent loss of customers; even at best it may involve loss of sales and possibly key staff during the sale process. In some cases, the seller will wish to keep confidential from all but the most senior management its intention to sell the target. This will limit the scope of the information available for a full due diligence investigation.

The seller will want to ensure that no approaches are made to its customers, suppliers, management or employees either with a view to poaching them or obtaining more information. On an auction sale particularly, although confidentiality undertakings are required as a matter of practice, it is more difficult to maintain confidentiality because of the number of parties involved. The seller may be reluctant to risk the consequences of a breach of security during the information-gathering process or may be concerned that the only purpose of obtaining more information is to renegotiate the price. Bridging the gap in expectations between the seller, who is concerned to restrict the release of information, and the buyer, who will want to gather as much information as possible, is a crucial element of the initial stages of any transaction.

Generally, the definition of confidential information also includes all relevant information exchanged between the parties orally. Indeed, in certain circumstances, the seller (or its managers) may disclose significant information during a meeting or a conference call. From a seller's perspective, it is advisable to include the information unveiled in the confidentiality agreement. Likewise, the confidentiality agreement should specify the ways in which information will be disclosed between the parties and the buyer's access to the data room.

With respect to duration, from the seller's perspective, the confidentiality agreement should not expire at the closing of the transaction, but some years later, also taking into account the duration of the non-compete agreement (if any).

The target company is normally not a party to confidentiality agreements between seller and buyer. However, where the target is required to provide information to the buyer that is directly related to the target company, the buyer will make a direct confidentiality undertaking vis-à-vis the target company with reference to such information which is provided by the target company to the buyer and is related to the target. Such undertaking is normally made either:

- Directly with the target company, as part of a confidentiality agreement to which the target is also a party (tripartite agreements).
- In a confidentiality agreement executed only by the potential buyer and the seller, but where the potential buyer assumes obligations in favour of the target company according to Article 1411 of the Civil Code.

Where the target is a third party to the confidentiality agreement, the buyer and the seller may agree that key persons at the target level (particularly the board members) involved in the contemplated transaction will be bound by the provisions in the confidentiality agreement as if they were a party to it (either by signing the confidentiality agreement or a letter of adhesion). By doing so, such key persons at the target level will be held personally accountable for any breach of their obligations of confidentiality under the confidentiality agreement, even if the target is not in fact a party to it.

Breach of confidentiality agreements leads to civil contract liability of the potential buyer. For this reason, it is common (and important for appropriate protection of the potential seller) for confidentiality agreements to provide for penalties for non-compliance. Such penalties can be of two types:

- An obligation to compensate for damages. The obligation to compensate for damages is usually included, but it may prove ineffective. Indeed, problems can occur in the determination of the damage suffered as a result of the dissemination or use of confidential information.
- A penalty clause (*clausola penale*). A penalty clause can be more effective than an obligation to compensate for damages. The penalty clause does not require proof of the damage under Article 1382(2) of the Civil Code. On the contrary, the penalty clause is limited to the sum indicated therein under Article 1382(1) of the Civil Code. It is important for the seller to expressly provide that the penalty clause is inserted in the confidentiality agreement without prejudice to the right to compensation for further damages, as the penalty clause is not a mandatory rule (*norma imperativa*) under the Civil Code and, consequently, can be derogated by the parties.

For more information on confidentiality agreements, see:

- Practice Note, Key documents for Acquiring a Private Company (Italy): Confidentiality (or Non-Disclosure) Agreement.

- Standard Documents, Confidentiality Agreement (Private Company Acquisitions): Cross-Border and Confidentiality Agreement (Asset Purchases): Cross-Border).

Disclosure of Sensitive Information and Clean Team Agreements

There are legal restrictions on the disclosure of sensitive information which the seller will have to be very careful to respect when providing information to the buyer in the context of a due diligence investigation.

Information classified as a military secret, information relating to a criminal investigation or information disclosed to a professional in their professional capacity (such as a legal adviser) cannot be disclosed, regardless of the existence of a confidentiality agreement.

Moreover, to avoid that the parties to a transaction are possibly deemed to exchange competitively sensitive information before the obtainment of the requisite antitrust clearances (which would be in violation of applicable antitrust rules), a seller should consider making available competitively sensitive information (so-called clean-team information) through restricted data room (or folders) to which only buyer's advisers and, in certain circumstances and always on a need-to-know basis, certain employees of the buyer not holding commercial responsibilities (for example, HR or Legal or IT) have access (so-called clean-team members). Clean-team members are generally required to enter into a clean-team agreement with the seller (generally additional to the confidentiality agreement) prohibiting the disclosure to non-clean team members of the clean-team information, unless such information is disclosed on an anonymised or aggregated basis, possibly subject to the prior consent of the seller.

Due diligence reports should accordingly comply with the non-disclosure undertakings set out in a clean-team agreement (and it is quite common that two different reports are prepared, one addressed to clean-team members (not subject to any restriction on how the information is set out in the report) and one to the rest of the working group (presenting the clean-team information on an anonymised or aggregated basis).

For general guidance, see Standard Document, Clean Team Agreement (Antitrust) (US).

Data Protection Restrictions

GDPR Requirements

Carrying out due diligence usually entails sharing personal data, which Article 4 of the General Data Protection Regulation ((EU) 2016/679) (GDPR) defines as "any information relating to an identified or identifiable natural person." Although in the context of an M&A transaction the majority of personal data shared with the buyer usually concerns the target's employees, it is not unusual for personal data of other categories of data subjects (such as customers or users) to be shared as well. Given that sharing personal data constitutes a data processing activity, it has to be performed in compliance with the obligations imposed by the GDPR and applicable national data protection legislation (in Italy, Legislative Decree no 196/2003 as amended by Legislative Decree no 101/2018) (Italian Data Protection Code). The Italian data protection authority (*Garante per la protezione dei dati personali*) can impose an administrative fine of up to EUR20 million and, for companies, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher, for failure to comply with the provisions of the GDPR. In particular, the following should be considered:

- Personal data shared with the potential buyer should be limited to what is strictly necessary for due diligence purposes. As a general rule, the seller should consider redacting personal information before making it available in a data room or, whenever possible, provide information in an aggregated form (for example, as an alternative to disclosing individual employment contracts, the seller should disclose a template contract or a fully redacted copy). Furthermore, access to the data room should be limited to a restricted number of persons.
- A legal basis for such personal data sharing should be established: in the context of due diligence it is generally impractical to rely on data subjects' consent. Therefore, the legal basis most frequently used is the so-called "legitimate interest" of the data controller or of the data recipient (that is, the potential buyer) provided that such a legitimate interest is not overridden by the data subjects' interests, rights or fundamental rights. The outcome of this balancing test very much depends on the circumstances of the case (for example, the nature and sensitivity of personal data at stake and/or categories of data subjects concerned), including in relation to the stage of the transaction. The weight of the potential buyer's legitimate interest to have access to personal data, which may be lower in the due diligence phase, increases as the transaction moves forward to the closing.
- Data subjects should be informed that their personal data will be shared with the buyer, unless one of the exemptions in the GDPR applies (for example, data subjects already have such information because the target's privacy policies already provide that personal data may be shared with third parties in the context of an M&A transaction, including in the due diligence phase).

- When selecting a third party for the setting up of a virtual data room, the seller should opt for a vendor which provides sufficient guarantees to implement appropriate technical and organisational security measures to ensure compliance with the GDPR; in addition, a data processing agreement between the seller and the vendor should be in place.
- In the case of transfers of personal data outside the European Economic Area and unless the recipient third country has been deemed by the European Commission as granting an adequate level of protection of personal data, appropriate safeguards should be in place (such as the execution of a data transfer agreement between the parties incorporating the standard contractual clauses approved by the European Commission, provided that the conditions for the use of those standard contractual clauses are met).

For more information on the implementation of the GDPR in Italy, see Practice Note, Italian Implementation of the GDPR.

Data Protection Due Diligence on the Target Company

The buyer will need to assess whether the target company duly complies with the GDPR and with the Italian Data Protection Code (as well as with any other data protection legislation applicable to the target's data processing activities). To this end, the buyer will want to be provided with the relevant documents in that respect and will need to review, in particular, the following documents:

- Privacy policies delivered to different categories of data subjects (for example, employees, customers and users) and any legitimate interest assessments or consent forms.
- Records of data processing activities.
- Policies and procedures concerning, for example, the management of data subjects' requests to exercise their rights, the use of IT devices, email and internet by the target's employees, and the management of data breaches and, more generally, data security.
- Pending or threatened complaints by data subjects, requests for information or investigations carried out by the Italian Data Protection Authority as well as by other national data protection authorities.
- Contracts with third parties processing personal data on the target's behalf (including related data processing agreements).
- Documentation related to security audits, cyberattacks, or data breaches, including notifications to data protection authorities or data subjects (or both).
- Details on data mapping, transfer impact assessments, safeguards in place, and implementation of supplementary measures in case of transfers of personal data outside the European Economic Area.
- Data protection impact assessments undertaken by the target.

For a Q&A guide to data protection in Italy which can help to structure the due diligence on data protection matters, see Country Q&A, Data Protection in Italy: Overview.

Pre-Contractual Obligations Under the Civil Code

Pre-contractual negotiations must be carried out according to the principle of good faith and a party can therefore be liable to pay damages in case of breach of the good faith obligation in conducting pre-contractual negotiations (*Article 1337, Civil Code*).

For more information on general contract formation and enforcement in Italy, including pre-contract considerations, see Country Q&A, Contract Formation and Enforcement in Italy: Overview.

Reviewing Information

Following the due diligence investigation, the buyer's first step in the review is to consider the completeness of the responses to the enquiries and whether all documents requested have been supplied and all questions satisfactorily answered.

A review of the target's contracts may raise various issues for consideration. Are there any "poison pills", such as a change of control clause in material contracts? Anti-trust or other regulatory issues may require the buyer to dispose of various brands owned by itself or the target before the acquisition can proceed.

In a legal due diligence, the following subjects are most commonly reviewed:

- Corporate information.
- Material agreements.
- Intellectual property.
- Real estate.
- Environmental.
- Employment.
- Litigation.
- Data protection.
- IT.

For general guidance, see Due Diligence Checklist: share purchases (UK).

The sections below are a guide to assessing the documents on corporate information and material agreements disclosed as part of the due diligence investigation. It is not an exhaustive list as each transaction may bring its own specificities.

Corporate Information

Company Searches

A company search at the Companies House can reveal a wealth of information about a target company. For example, the company annual accounts, details of directors, articles of association, charges over the company's shares, and liquidation or winding-up resolutions.

The companies that are searched will depend on the nature of the transaction. On most share purchases, the buyer or its advisers should search against the target and its subsidiaries, any companies in which it has a significant shareholding, the corporate seller and corporate guarantor (if applicable).

The information at the Companies House will not necessarily be completely up to date. Information should generally be filed within a given period. However, the company may not have filed information within the required period. This may give rise to a default fine for the company but no protection is given to a buyer.

The prudent buyer should do a search against all relevant companies at the outset of the due diligence investigation and then repeat the exercise immediately before exchange to check that there have been no changes since the first search. The buyer will also require a seller to warrant under the purchase agreement that all the information included in the Companies' Registry is complete, correct and up to date.

Companies (public limited companies (SPA) and private limited companies (SRL)) must make publicly available at Companies House several documents concerning the company's business and operations including:

- Annual accounts.
- Articles of association, deeds of incorporation and any resolution of the general meeting of shareholders amending such articles.
- Appointment and termination of directors, members of the board of statutory auditors and liquidators.
- List of shareholders and encumbrances on the shares.
- Whether or not the company is under liquidation or bankruptcy proceedings.
- Whether the company has undergone any merger, demerger or conversion (*trasformazione*).

Notwithstanding the documentation filed at the Companies House, the buyer's advisers should request the seller to upload in the data room the corporate information to be sure that the information they review is up to date and nothing of relevance is lost during the due diligence investigation.

Once this information has been supplied, it needs to be carefully reviewed. It is important to remember that the primary purpose of this exercise is to ensure that the buyer is buying what it thinks it is buying and that there are no surprises.

Key issues to check include the following:

- **Articles of association (*statuto*).** The articles of association of the company may contain provisions that would be of interest to the buyer, such as pre-emption rights on share transfers, lock-ups, drag-along and tag-along rights, provisions relating to shareholder approvals, minority shareholder protections, rights of appointment of directors or unusual limits on the authority of the board of directors, enhanced quorums and veto rights on certain matters. It is also important to understand whether the share capital of the company has been fully subscribed and paid-in. The adviser should review the articles together with the shareholders' agreement because they may contain the same type of information and a combined review of them would allow the buyer to have a better view of the target's governance.
- **Shareholders' book (*libro soci*).** The shareholders' book may reveal the existence of a minority holding that could limit the buyer's freedom of action after the acquisition. This book can also show any discrepancies between the shareholding as described by the seller and the shareholding as recorded by the company. Any such discrepancy must be addressed before drafting the purchase agreement. SRLs are not required to maintain a quotaholders' book. It is also important to verify whether the company shareholders' book is in compliance with the law and up to date.
- **Pledges.** It is important to check that the corporate seller has not pledged their shares in the target company and that the target has not pledged any of its assets.
- **Minutes of the board of directors.** All material actions of the company should be reflected in the minutes. Board minutes can be a rich source of information, containing references to, for example, acquisitions and disposals, financing, litigation, poor or unusual operating results, issues of guarantees and security interests in the company's assets. A careful review of the minutes can unearth material information about the company's business and

legal affairs and identify critical documents, such as an acquisition or loan agreement, which might be relevant to the proposed transaction. Usually, the buyer's advisers do not review all of the minutes of the board of directors and instead limit their review to the last three to five years.

- **Minutes of board committees.** A review of board minutes alone may not be enough if the board has formed committees that engage in significant business. As per the minutes of the board of directors, usually, the review of the minutes of board committees is limited to the last three to five years.
- **Minutes of the board of statutory auditors.** All actions of the company affecting its financial and accounting situation should be assessed by the board of statutory auditors, which may raise objections in the event that a transaction is against the company's interest. Usually, the buyer's advisers do not review all of the minutes of the board of statutory auditors and instead limit their review to the last three to five years.
- **Accounts.** It is important to review the accounts of the last three to five years of the company to understand its financial situation, having particular regard to, inter alia, its short-term indebtedness towards banks. The legal due diligence team should interact with the financial adviser to coordinate their findings and better understand the accounting data of the target. In an asset purchase, under Italian law, the buyer is jointly and severally liable with the seller for all pre-completion liabilities relating to the business to be transferred, to the extent such liabilities are specifically and expressly listed in the accounting records of the seller.

Material Agreements

Every business has agreements that are material to the success of its operation. These might include:

- Supply agreements for crucial raw materials.
- Sales agreements (for example, output or requirements contracts).
- Intellectual property licences (for example, patent or trade mark licences).
- Service or management contracts (for key staff).
- Leases for important equipment (for example, computers).
- Real estate leases for facilities.
- Joint venture agreements.
- Shareholders' agreements.
- Loan agreements to provide capital to run the business.

Other agreements, such as agreements to dispose of assets, businesses or shares may subject the company to continuing liability with respect to a business sold previously.

In addition, when buying a company out of a group, intra-group transactions involving the target company need to be investigated to ensure they are not transfers at an undervalue (rendering them potentially unlawful or avoidable) and do not give rise to, inter alia, any contingent tax liabilities.

The due diligence enquiries need to identify those agreements that are material to the target's business. That is, those that will affect the price the buyer is willing to pay for the target or which pose material business or liability risks. The due diligence checklist will typically indicate the criteria by which a contract is considered material, for example, by value.

Having identified the material agreements of the business, the team should check that the contracts are valid and effective, that they have been executed properly and that they do not contravene, for example, any competition law or regulatory requirements.

The principal commercial terms of these agreements should be noted. The following questions are relevant to almost all enquiries:

- **Parties.** Are the parties to the agreement the persons to whom the agreement relates? For example, in a licence of intellectual property, is the company using the intellectual property the company named in the agreement or is the named party the parent or associated company of the user? Is the grantor of the licence the legal and beneficial owner of the intellectual property? If the contract contains a non-assignment provision (under which the party is required to obtain the other party's prior written consent if the agreement is assigned, transferred or otherwise disposed of by it to one of its subsidiaries or affiliates), this issue will need to be addressed.
- **Execution of the agreement.** Has the agreement been properly executed so that it can be deemed valid, effective and enforceable? Did the person signing the agreement have the proper authority?
- **Change of control clause.** Does the agreement provide that the consent of the other contracting party must be given on a sale of shares or a change of control of the business? Does the change of control affect any employees, for example, will it require a payment or result in an extended notice period?
- **No assignment clause.** Does the agreement provide that the consent of the other contracting party must be given to assign the agreement to third parties?

- **Confidentiality.** Is the target already in breach of this clause in an agreement, possibly giving a right to damages against the target should it be acquired?
- **Warranties, guarantees, indemnities.** Warranties in most commercial contracts either relate to compliance with applicable laws and regulations or compliance with the quality standards and the specifications of the contract. Additionally, there are certain standard indemnities relating to breach of third-party rights, breach of contract and liability for damages. The extent of these warranties and indemnities should be noted.
- **Term and termination.** What is the date of commencement of the agreement? Is the agreement subject to automatic renewal? Is the agreement subject to conditions precedent, for example, a regulatory approval? When does the agreement terminate? Will a major supply contract, for example, terminate soon? Will any compensation be payable on termination of an agreement? What notice must be given to terminate the agreement? What actions entitle the other party (or the target) to terminate for breach?
- **Liability and exclusion clauses.** Is the liability of the other party or the target limited in respect of breach of the agreement? Is there an exclusion of liability in respect of the target's obligations or the other party's? If so, is it likely to be enforceable?
- **Intra-group transfers.** Are all intra-group transfers to which the target is party made at arms' length? Do any such transfers give rise to any contingent tax liabilities?
- **Restraint of trade.** Are any restrictions imposed on any party's ability to conduct its business?

The significance of issues raised by a review of the target's legal documents will often depend on whether the proposed transaction is a share sale or an asset sale. For example, a change of control clause may be of no significance on an asset sale whereas it might be crucial on a share sale. On an asset sale, the assignment clause will be critical; indeed, under Italian law, the buyer succeeds by operation of law in all contracts being part of the transferred business, unless:

- Any contracts expressly contain restriction to their assignability or transferability (or both).
- Any contracts is *intuitu personae*.

Inevitably, agreements will raise their own specific issues in addition to the above. For example, the material terms of a debt instrument include maturity dates, prepayment and redemption provisions, interest rate provisions, default provisions (including change of control provisions) and material covenants.

The buyer's intentions also have a bearing on the review of material agreements. For example, if a loan to the target is to be repaid on completion, the provisions of the loan agreement relating to prepayment and redemption are critical. If it is to be left outstanding, the buyer will want to be sure that the terms are appropriate when applied to it as the new borrower.

As a matter of practice, there may be several different people reviewing the material agreements. To ensure that the review of these agreements and the results of this review are presented in a coherent way, it may be helpful for a pro forma checklist to be filled in for each agreement reviewed. By doing this, the person co-ordinating the due diligence review is presented with the details of the documents in a uniform manner where they were reviewed by different people.

A pro forma checklist might include the following headings:

- Type of contract.
- Parties.
- Date.
- Brief description.
- Value or consideration.
- Non-assignment.
- Change of control.
- Term and termination.
- Warranties, guarantees, indemnities.
- Liability and exclusion.
- Restraint of trade.
- Confidentiality.
- Onerous and unusual terms.
- Competition issues.
- Proper execution.
- Choice of law and arbitration clause (if any).

Communicating Results of Due Diligence

Part of the key to a successful due diligence investigation is communicating the results to those responsible for assessing the proposed transaction and making the decisions.

The due diligence review is usually carried out parallel to the negotiation of the acquisition and the drafting of the acquisition agreement. Any significant information that might affect negotiations or the drafting should be communicated immediately to a senior lawyer or the client even though the due diligence exercise is not complete. Before they even embark on the due diligence exercise, all members of the team must be alerted to potential "deal-breakers" so that they understand what information is so important that it must be shared as soon as it is discovered.

Important information that comes to light during due diligence must be communicated to the buyer and to the directors of the buyer. Any problematic issues which come to light should then be raised at a full board meeting so that they can be properly considered by those responsible for approving the deal.

Due Diligence Report

Once the investigation is complete, the information should be summarised in the due diligence report. Generally, each adviser prepares a due diligence report in relation to the activity carried out (for example, the legal team will draft the legal due diligence report and the financial team will draft the financial due diligence report). To allow each team to be updated on all of the relevant matters of the transaction, the due diligence reports are shared among all the buyer's advisers.

Depending on the buyer's instructions, the due diligence reports may be drafted as:

- Full due diligence reports, containing a detailed description of all the documents reviewed and not only the key findings from the due diligence exercise.
- Red-flag due diligence reports, only containing the main issues detected by the advisers.

However, it is common practice to draft a due diligence report that is a combination of the abovementioned models, containing both a summary of the main issues detected in the due diligence exercise (the so-called executive summary) and a detailed description of at least the main documentation reviewed.

The due diligence report should have an index and be written in a clear and concise manner, free of legal jargon.

The due diligence report is normally divided in the following sections:

- **Disclaimer.** The disclaimer defines the scope of the due diligence exercise and its purpose. In addition, the disclaimer outlines the criteria and how the due diligence was carried out, including a precise indication of what was done by the adviser. The disclaimer limits access to the due diligence report and the responsibility of the persons who prepared it.
- **Executive summary.** The executive summary is the part of the report that everyone will read, should be short and should summarise all of the key findings of the due diligence review.
- **Analysis.** The analysis section describes the documents reviewed and/or critical issues arising from the due diligence (depending on the type of the report agreed with the client). The analysis section is divided into other sub-sections in relation to the areas of investigation (for example, corporate, contracts and litigation).
- **List of documents reviewed and due diligence questionnaire.** Usually, the list of the documents reviewed and the due diligence questionnaire updated to the most recent information received from the seller are attached at the end of the due diligence report.

There is a risk that preparing the written report will overshadow the due diligence process and prevent relevant information reaching decision-makers at the earliest opportunity. A sensible approach is to build interim reports into the procedure, perhaps on a weekly basis, summarising issues of significance and also an early warning mechanism to alert decision-makers to potential deal-breaker issues. There must also be the option for information to flow back to those carrying out the due diligence when decision-makers have questions arising out of the negotiation process or the interim reports they have received.

Time must be included to review the report, follow up on further questions and evaluate fully the implications of issues that arise.

Some clients may wish to have a board presentation in addition to a written report (for general guidance, see Standard Document: Board briefing note (skeleton): Acquisitions (UK)).

While the report will often be addressed to executive management, it should be in a form that can be circulated to the board, in advance of the meeting at which definitive approval of the acquisition will be considered. The report is often accompanied by a business assessment of the risks.

For general guidance, see Standard Document, Legal due diligence report: acquisitions (UK).

Impact of COVID-19 and Russia-Ukraine war on Due Diligence

COVID-19 and Russia-Ukraine war have affected Italian companies, which are facing significant challenges to survive. The legal due diligence exercise should take into account the increased legal risks connected to these events.

Potential buyers and their advisers in charge of the due diligence investigation should take into account at least the following aspects:

- Mitigation and contingency plans to minimise the effects of COVID-19 or the Russia-Ukraine war (or both).
- The target's ability to perform its obligations under the main contracts or other key contracts (such as, gas supply agreements) .
- The target's revenues and solvency risk.
- Furlough of employees (*cassa integrazione*).
- Any change in law that may affect the target's business.
- Any termination rights (for example, material adverse change) that can be triggered under the main contracts in connection with COVID-19 and Russia-Ukraine war.
- Any insurance policies of the target in relation to COVID-19 and Russia-Ukraine war.
- The level of impact of COVID-19 and Russia-Ukraine war in relation to the target's industry sector.

The Italian government has enacted special legislation to make certain changes to company law which were needed as a result of various practical difficulties for companies caused by the COVID-19 pandemic and by Russia-Ukraine war.

For more information on the changes concerning the COVID-19 pandemic, see Articles, COVID-19 and force majeure, hardship and other doctrines in Italian contract law and Electronic execution of contracts, e-signatures and COVID-19: Italy.

For a Toolkit to help counsels working in the US, UK, EU, Canada, Australia, and New Zealand guide their clients through the business interruptions caused by the war in Ukraine, including key sanctions imposed on Russia and Belarus, persons, and entities, see Russia Sanctions and Related Considerations Toolkit.